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No. 03-180

IN THE

Supreme Court of the United States

FRANCES BROADDUS CRUTCHFIELD
and HENRY RUFFIN BROADDUS,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT COUNTY OF HANOVER, VIRGINIA

STERLING E. RIVES
County Attorney
BARBARA M. ROSE
Deputy County Attorney
P.O. Box 470
Hanover, Virginia 23069
(804) 537-6035

WILLIAM G. BROADDUS
STEWART T. LEETH*
McGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, Virginia 23219
(804) 775-4719

* *Counsel of Record*

Counsel for Respondent
County of Hanover, Virginia

182778

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

Whether this Court should grant certiorari when the Court of Appeals' decision is not contrary to the case law of any other circuit concerning the application of scrutiny to agency action?

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Respondent, the County of Hanover, Virginia ("County"), requests that the Court deny the petition for certiorari filed in this case by Frances Broaddus Crutchfield and Henry Ruffin Broaddus ("Petitioners").

INTRODUCTION

This case meets none of the criteria warranting an exercise of this Court's certiorari jurisdiction. *See* Sup. Ct. R. 10. It implicates no conflict among the circuits and raises no important, unsettled questions of law. To the contrary, this case involves an ordinary review of agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Under the APA, a court is obliged to defer to a reasonable judgment by an agency acting pursuant to congressionally delegated authority. Agency action may be set aside only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A reviewing court considers only the "administrative record that was before the [agency] at the time [it] made [its] decision," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), and "is not empowered to substitute its judgment for that of the agency," *id.* at 416.

Moreover, the "Question Presented" as framed by Petitioners is not, in fact, presented by the United States Court of Appeals for the Fourth Circuit's ("Court of Appeals") decision in this case. The Court of Appeals did not expressly or implicitly hold that heightened scrutiny is inapplicable in ***all*** cases. Rather, the Court of Appeals found that the extraordinary strict scrutiny applied by the district court in ***this case*** was not appropriate under the ***facts*** of the case.

The agency action at issue is a decision by the United States Army Corps of Engineers ("Corps") to verify the use of four general permits, called Nationwide Permits, for the construction of the County's wastewater treatment plant project. The Court of Appeals held that the Corps was entitled under its regulations to approve the County's project under the Nationwide Permit regimen. The Court of Appeals further held that there was ample evidence in the administrative record to support the Corps' substantive decision to approve the project.

In an attempt to transform this typical administrative review action into one worthy of this Court's review, Petitioners argue that the Court of Appeals' decision in this case conflicts with other circuits, including the Court of Appeals for the District of Columbia Circuit in *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979), regarding the level of scrutiny applicable to review of the Corps' decision in this case. To create a conflict, Petitioners argue that the Court of Appeals held that heightened scrutiny of administrative action following remand would never be appropriate. Petitioners misconstrue that decision. In fact, the Court of Appeals, as other courts, considered the appropriate level of scrutiny for this case and found the district court's use of heightened scrutiny of an administrative action following remand was erroneous based on the facts. The Court of Appeals pointed out that the Corps did not reach virtually the same decision after a judicial remand (a fact that might trigger heightened scrutiny), but was presented with a substantially new proposal. The Court of Appeals also noted that whatever the district court thought of the Corps' reasoning in its evaluation of the

original proposal, it is uncontested that the Corps assigned new staff with no previous connection to the project to review the new proposal.

In short, Petitioners have attempted to manufacture a certworthy issue by utilizing other circuits' dicta and by misconstruing the Court of Appeals' decision in this case. Far from implicating important jurisdictional conflicts, this case involves a straightforward affirmation of agency action consistent with well-settled law.

COUNTERSTATEMENT OF FACTS

Petitioners oppose construction of the County's new municipal wastewater treatment plant ("plant") and associated conveyance systems. Petitioners own an approximately 900-acre farm, a portion of which now contains an underground County sewer force main connected to the plant.

The County has undertaken the construction of the plant as part of a comprehensive program to manage its growth. App. at 3A, 156A-158A. Henrico County, an adjoining jurisdiction which presently treats up to 5.4 million gallons per day ("mgd") of the County's wastewater, had advised the County that it cannot satisfy the County's growing wastewater treatment needs beyond the flow limit in the present contract. *Id.*

After considering several alternatives, the County ultimately determined to build its own wastewater treatment plant in the eastern portion of the County and discharge treated wastewater to the Pamunkey River ("River"), App. at 3A, pursuant to the terms of permits issued by the Commonwealth of Virginia under the State Water Control Law. The County's project consists of (1) the plant;

(2) the Lee Davis Road Pump Station ("Lee Davis Pump Station") and force main approximately four miles long, which will convey wastewater to the plant for treatment; (3) a force main approximately eight miles long, which will convey treated wastewater from the plant to the River; and (4) a discharge structure on the River bottom. JA 253.

Construction of the County's project will permanently affect wetlands totaling just 0.1624 acre. App. at 156A. As described in the Court of Appeals opinion, when a party proposes to engage in construction involving the placement of dredged or fill material in wetlands, Congress has authorized the Corps to require a permit. 33 U.S.C. § 1344(a); App. at 4A. Congress further authorized the Corps to utilize Nationwide Permits (referred to as "NWPs") for activities which will cause only minimal adverse environmental effects. 33 U.S.C. § 1344(e)(1). Pursuant to this Congressional delegation, the Corps designed a NWP program "to regulate with little, if any, delay or paperwork certain activities having minimal impacts." 33 C.F.R. § 330.1(b).[1] Utilization of Nationwide Permits is simpler than the individual permit process, which involves a resource-intensive review that involves extensive, site-specific documentation and review, opportunity for public hearing, public interest review, and a formal determination. *See* 33 C.F.R. Parts 322, 323, and 325.[2]

1. Petitioners erroneously claim that the project must be "fully justified" in order to utilize Nationwide Permits. Pet. at 6. Petitioners have miscited the Corps' regulations, attempting to apply a regulation applicable in situations in which the Corps utilizes Nationwide Permits while also considering an individual permit for the same project. 33 C.F.R. § 330.6(d). The Corps utilized only Nationwide Permits in this case, and the regulation cited by Petitioners is inapplicable.

2. Nationwide Permits are not "issued" to individual parties. Instead, activities falling within the scope of a NWP are automatically

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The Corps' regulations direct the Corps to "review ***all*** incoming applications for individual permits for possible eligibility under regional general permits or NWPs." 33 C.F.R. § 330.1(f) (emphasis added).

The Prior Project

The project at issue in this case was the County's second effort to permit the plant and conveyance systems. Originally, the County proposed a different project for permitting by the Corps. That original project did not include the Lee Davis Pump Station and force main. It included only the plant, force main to the river, and outfall diffuser. The County's initial proposal for delivering wastewater to the new plant was a separate piping system called the Totopotomy Creek Interceptor ("Interceptor"). The Interceptor was located in a different part of the County than the Lee Davis Pump Station and force main and would have permanently affected over three acres of wetlands as finally proposed. In contrast, the proposed Lee Davis Pump Station and force main will impact only 30 square feet of wetlands. In the initial case, the Corps determined that it could permit the plant, force main and outfall separately from the Interceptor under 33 C.F.R. § 330.6(d), which provides, in part, that the Corps may authorize portions of a project having "independent utility" to proceed under Nationwide Permits while it considers an application for an individual permit for other portions of the

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authorized subject only to any preconstruction notification requirement for some Nationwide Permits. *See New Hanover Township v. United States Army Corps of Engineers*, 992 F.2d 470, 471 (3d Cir. 1993). In cases requiring preconstruction notification, the Corps will "verify" the applicability of the NWP to the proposed activity. 33 C.F.R. §§ 330.1(e), 330.6(a)(1).

same project. The Corps verified Nationwide Permits for the plant, conveyance system away from the plant and the outfall diffuser. The Corps began to review the County's permit application for the Interceptor but never made a final permitting decision on that project.

The District Court's Decision In *Crutchfield I*

Petitioners filed a Complaint challenging the Corps' determination on the first project. *See Crutchfield v. United States Army Corps of Engineers*, 154 F. Supp. 2d 878, 904 (E.D. Va. 2001) ("*Crutchfield I*"), *appeal dismissed as moot*, No. 01-2488 (4th Cir. May 31, 2002).[3] The district court vacated the Corps' Nationwide Permit verifications on grounds that the agency did not include the anticipated means of bringing initial wastewater flows to the plant for treatment (*i.e.*, the Interceptor) and, thus, the project lacked "independent utility." *Crutchfield I*, 154 F. Supp. 2d at 904.[4] Thereafter, on November 2, 2001, the court entered a permanent injunction prohibiting the County from continuing construction which had been underway for fifteen months on grounds that further construction might "pressure" the Corps to approve subsequent permits for the County.

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3. As a result of the Corp's approval of the County's subsequent application, which occurred during the pendency of the appeal, *see infra* pp. 11-16, the Court of Appeals remanded the first case to the district court and dismissed the appeal as moot on May 31, 2002. Order, *Crutchfield v. United States Army Corps of Engineers*, No. 01-2488 (4th Cir. May 31, 2002).

4. Prior to the district court's decision on the merits in *Crutchfield I*, the less than two-tenths of an acre of wetlands at issue in this present case had already been fully impacted pursuant to the NWPs which were later vacated.

Crutchfield I, 192 F. Supp. 2d 444 (E.D. Va. 2001). The County noted its appeal to the Court of Appeals. The parties briefed the appeal and the Court of Appeals scheduled argument for June 6, 2002. Prior to argument, however, the Court of Appeals remanded the case and dismissed the appeal as moot.[5]

The Current Project

After entry of the District Court's November 2, 2001 injunction in *Crutchfield I*, the County made substantial changes to the project. The County added the Lee Davis Pump Station and force main as a source of wastewater for the plant. The County also abandoned the Interceptor, which was the principal focus of the Petitioners' Complaint in *Crutchfield I*. JA 121, 136-39, 333. The County then submitted a new application to the Corps on November 16, 2001.

The components of the new application included the plant site, where construction had already permanently affected 0.1617 acres of wetlands, the Lee Davis Pump Station which, as originally planned, would have permanently affected 240 square feet of wetlands,[6] the force main from the pump station to the plant, the force main from the plant to the River, which, as constructed, has no permanent impact on wetlands, and the outfall, which will affect temporarily 207 square feet (0.005 acre) of subaqueous land. JA 549-52. The amount of wetlands permanently impacted by construction of the current project ***totals*** just 0.1624 acres. JA 119.

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5. *See supra* note 3.

6. During final design of the Lee Davis Pump Station, the County was able to reduce its total permanent wetlands impact to 30 square feet (or 0.00069 acre), rather than the 240 square feet initially proposed.

The Interceptor was not part of the County's new project application, and the County has no plans to construct it. App. at 164A, 197A-198A; JA 121, 136-37, 148-49, 265-66, 312, 326, 333-36. The County eliminated the Interceptor from its Capital Improvement Plan, App. at 197A; JA 326, and had not obtained all the easements necessary to construct it. JA 138, 337. In addition, the County abandoned its proposed Influent Pump Station, which was a necessary device for connecting the Interceptor to the plant. App. at 200A-201A; JA 138-39, 333.

The Corps' Extensive Review

After receiving the new application, the Corps, mindful of the project's history and prior litigation in *Crutchfield I*, proceeded to implement the district court's desire that the new application be considered "*ab initio.*" JA 38. The Corps assigned new staff, who had had no previous involvement in the project, to review the application. JA 110; *Crutchfield I*, 175 F. Supp. 2d 835, 843 (E.D. Va. 2001).

The Corps studied the County's new application for five months. Early in the review process, the Petitioners charged that the County had not "fully and fairly disclosed [to the Corps] all of the activities the County has planned" related to the new project. JA 121, 546, 547. In response, the Corps' newly assigned staff reviewed briefs filed by the parties in *Crutchfield I*, analyzed Petitioners' comments, met with the County so that the County could outline future plans, and met with the Virginia Department of Environmental Quality ("DEQ"). JA 122, 547, 569-70.

The Corps' District Engineer determined that the County had fully disclosed all the activities reasonably related to the new project. *E.g.*, App. at 164A. The Corps further

determined that the County's application was for a "single and complete project" with "independent utility" from the abandoned Interceptor as well as from other future improvements. App. at 236A-237A; JA 22. On December 11, 2001, the Corps published public notice of the County's application. App. at 164A; JA 122, 549-62.

After the Corps conducted a site visit and reviewed other information it had gathered, the Corps' permit writer recognized preliminarily that the impacts on wetlands caused by the County's proposed construction activities would be "minimal, both individually and cumulatively and would qualify for authorization under general permits." App. at 164A-165A; JA 122. Ordinarily, such findings would result in prompt verification of the applicable Nationwide Permits. But the Corps did not follow that course here. Instead, it continued its analysis. App. at 165A; JA 123.

The Corps also extended the time for public comment due, in part, to requests from the Petitioners. JA 462. The Corps received and considered two volumes of documents from Petitioners' counsel and consultant totaling over 600 pages of material. Administrative Record ("AR") 1609 through 2223. The Corps met with the Petitioners to discuss the new project, JA 563-64, talked with them by telephone and reviewed their 600 pages of written comments. JA 474, 500.

The Corps also considered comments from numerous state and federal agencies. "Every state and federal agency that reviewed this application either commented favorably on the revised proposal or noted no objection to it after further study." App. at 25A. For example, the United States Environmental Protection Agency ("EPA") and the Virginia

DEQ advised that the plant will not adversely affect the wate quality of the Pamunkey River. App. at 205A-208A, 180A 183A; JA 127-30, 506, 510, 518, 522, 577, 593; AR 2269.

The Corps studied whether the cumulative impacts o fill activities associated with past, present and reasonabl foreseeable future projects by either the County or b other developers in the area would prevent utilization o Nationwide Permits. App. at 194A-204A; JA 135-40, 586 It found all such impacts to be minimal. *Id.*

The Corps investigated the Petitioners' claim that th abandoned Interceptor would still be built. The Corps foun the Interceptor was not reasonably foreseeable because th County (1) had eliminated funding for the Interceptor (2) intended to remove it from the Comprehensive Plan (3) had ceased obtaining necessary easements, and (4) ha abandoned the Influent Pump Station without which th Interceptor could not send sewage to the plant. App. at 196A 204A; JA 137-38.

On April 4, 2002, after completing its review, and afte having imposed additional, new conditions on the County the Corps confirmed that Nationwide Permits would indee be appropriate in light of the minimal impacts associate

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7. The Corps also considered comments from the Virgini Department of Health, which advised that "the plant is where it ough to be" and that "the discharge location is where it has to be and tha the water from the discharge pipe will actually be cleaner than th water in the Pamunkey River," JA 582, the Virginia Department o Conservation and Recreation, AR 2261, the Virginia Marin Resources Commission, AR 2267, the United States Fish & Wildlif Service, the Virginia Department of Game and Inland Fisheries JA 126, 505, 507, 512, and the Commonwealth's State Histori Preservation Officer. JA 125, 508; AR 2347. *See* App. at 204A-218 (memorandum on coordination with state and federal resources).

with the new project.[8] The Corps' decision to verify Nationwide Permits was accompanied by a 47-page Memorandum for the Record ("MFR") explaining its decision and an Administrative Record ("Record" or "AR") of over 6,000 pages.[9]

Crutchfield II

Petitioners' Complaint, filed on April 19, 2002, alleged that the Corps' approval violated the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*, National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*

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8. Contrary to the Petitioners' claim, the Corps made no "assurances" that it would issue an individual permit in this case. Pet. at 1, 7. Before the County announced its new project and the elimination of the Interceptor and filed its second application, counsel for the Corps advised that the Corps would consider the anticipated application under the Corps' regulations governing applications for an individual permit, but the Corps did "not understand the Court to have required an individual permit application for the interceptor." JA 108-110. No one challenged that assertion. Moreover, the Corps' regulation requires that the Corps consider all incoming applications for potential application of the Nationwide Permit program. 33 C.F.R. § 330.1(f).

9. While the Corps chose to issue a lengthy Memorandum for the Record in this case, there is ***no*** regulatory requirement for the Corps to issue a detailed decision document simply to verify NWPs. *Compare* 33 C.F.R. § 325.2(a)(6) (description of decision document issued for individual permits) *with* 33 C.F.R. §§ 330.1(b); 330.5(b)(3) (when general NWP initially proposed, Corps prepares a decision document for NEPA, § 404(b)(1) analysis and statement of findings); *and* § 330.6(a).

Substantively, the gravamen of their lawsuit (hereinafter "*Crutchfield II*") was that the Corps, having initially treated the County's proposal as an application for an individual permit, could not subsequently verify Nationwide Permits in place of an individual permit. Petitioners also claimed that the new project should not have been verified as eligible for multiple NWPs because it was not a "single and complete project."

The Court of Appeals reviewed "*de novo* [the] district court's determination," giving consideration to the deferential standard usually applied to a federal agency's interpretation of its own regulations and to findings of fact set forth in the administrative record. The Court of Appeals, at the outset, found that the district court's application of heightened scrutiny to be erroneous in light of the facts of this case. App. at 10A-13A. The Court of Appeals held that "the procedures followed by the Corps in its review of Hanover County's permit application were lawful" and that "it was neither arbitrary nor capricious for the Corps to decide that Hanover County's revised proposal was a single and complete project."[10] App. at 17A, 24A-25A. The court reversed

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10. Petitioners claim there is a lack of record evidence supporting the project's independent utility. Pet. at 9. The Court of Appeals fully considered this issue and held that the County's substantially changed proposal was a single and complete project which would accomplish the County's stated goal of providing additional wastewater treatment capacity, App. at 20A, and would also allow the County to remain under its contractual cap with Henrico County for a significant period of time. App. at 21A. While there is no doubt that other conveyance mechanisms will eventually be needed, the Court of Appeals noted that it is simply not possible for the County to predict when, where and how those sewer lines will

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"the district court and reinstate[d] the Corps' verification of the proposal's eligibility for [Nationwide Permit] approval." *Id.*

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR DECISIONS OF OTHER COURTS OF APPEALS

In an attempt to manufacture a case for certiorari where none exists, Petitioners argue that the decision below conflicts with the holdings of the D.C. Circuit and other circuits regarding the application of "heightened scrutiny" to agency decisions. Pet. at 10-12. Petitioners are wrong.

Contrary to Petitioners' suggestion, Pet. at 8, 12, the Court of Appeals below did not reject application of "heightened scrutiny" in all cases involving review of agency decisionmaking. The Court of Appeals simply found that the district court's justification for doing so under the facts of this case was wrong. Specifically, the Court of Appeals found erroneous the district court's "highly exacting, essentially de novo examination of the record, [in which it] repeatedly reject[ed] the Corps' conclusions and [drew] its own

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actually be constructed nor does the Clean Water Act require this. *Id.* Rather, the question is "whether the proposed project is reasonably defined to include all of its definitely planned, concretely identifiable elements" and the Corps is the arbiter of the point when speculative and inchoate plans become sufficiently foreseeable to require inclusion for permitting purposes. *Id.* In any event, Petitioners' failure to raise this issue as a "Question Presented" for the Court's consideration under Sup. Ct. R. 14 makes evident its lack of merit.

independent inferences from the evidence." App. at 12A. The district court justified its review by holding that the Corps' review of the second project had reached "virtually the same decision after judicial remand." The Court of Appeals' reasoning, which Petitioners only selectively quote in their Petition, provides:

> In the first place, it is not true that the Corps reached virtually the same decision after the judicial remand. The County presented a substantially new proposal, eliminating the only problematic element from the prior proposal (the Interceptor) and replacing it with a completely different structure (the Lee Davis pipeline) located in a different part of the County. And whatever the district court thought of the Corps' reasoning process during its evaluation of the original proposal, it is uncontested that the Corps assigned new staff with no previous connection to the project to review the revised proposal.
>
> The Corps' dedication to a credible decisionmaking process on remand was clear: it devoted more than five months to reviewing the application, engaged in an extensive and ongoing dialogue with the County, considered comments from at least eight other federal and state environmental and health agencies, and generated an administrative record of more than 6,000 pages. The district court thus erred initially by failing to accord the proper statutory deference to the Corps' decision.

App. at 12A-13A.

Moreover, Petitioners' utilization of *dicta* from circuits does not create a circuit conflict needing resolution by this Court. None of the cases upon which Petitioners rely requires "heightened scrutiny" in all cases involving subsequent review of remanded agency action. Instead, each case acknowledges that greater scrutiny may be appropriate but only in certain circumstances inapposite here.[11]

In the principal case relied upon by Petitioners, *Natural Resources Defense Council*, the Court of Appeals for the District of Columbia did not find that greater scrutiny was appropriate. There, the Court of Appeals considered the Securities and Exchange Commission's refusal, after informal rulemaking proceedings, to promulgate rules requiring comprehensive disclosure by corporations of their environmental and equal employment policies. The court held that the decision was subject to "at least a minimal level of judicial scrutiny." 606 F.2d at 1047. On the other hand, the scope of review was "narrow" and "limited to ensuring that the Commission has adequately explained the facts and policy concerns it relied on and . . . that those facts have some basis in the record." *Id.* at 1053. The Court of Appeals noted only in *dicta* that greater scrutiny may be "useful" under certain circumstances. *Id.* at 1049 n.23.

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11. For example, in *Preston v. Heckler*, 734 F.2d 1359, 1372-73 (9th Cir. 1984), the court recognized the potential to utilize greater scrutiny but did not do so. In *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 190 (3d Cir. 1983), the court discussed whether to apply greater scrutiny when agency action was based on authority it had previously disclaimed and encroached on congressional policies. In *Maggard v. O'Connell*, 671 F.2d 568, 570-71 (D.C. Cir. 1982), the court approved of a higher level of scrutiny by a court reviewing findings of a private trustee, because such an entity is less insulated from outside pressures than federal agencies.

A recent case from the same court severely undermines Petitioners' attempt to fabricate a certworthy issue. In *City of Los Angeles v. United States Department of Transportation*, 165 F.3d 972 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1074 (2000), the court reviewed the Department of Transportation's ("DOT's") decision setting aside Los Angeles' increase of landing fees at the Los Angeles International Airport. In an earlier case, the court had reversed DOT's first attempt to set aside such fee increases. 165 F.3d at 975. The city argued that review in the second case should be more strict given that DOT had "arrived at the same result on remand as it had reached in its initial decision." *Id.* at 977. The court determined that its review was "still a matter of determining whether the agency's final decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (citations and quotations omitted). Thus, contrary to Petitioners' suggestion, the principal circuit upon which it relies to suggest that a conflict exists clearly holds that, merely because an agency has arrived at a similar decision in a second proceeding, in and of itself, does not require greater scrutiny in a subsequent challenge to agency action.

In any event, the Court of Appeals in the instant case determined that the Corps did not reach the same result on remand and the *dicta* Petitioners rely upon is inapplicable. There is no conflict among the circuits.

II. THE DECISION BELOW DOES NOT REQUIRE THE COURT TO CONSIDER WHETHER "HEIGHTENED SCRUTINY" IS APPROPRIATE UNDER THE APA

Petitioners' other purported ground for review is a purely academic one. Petitioners want the Court to consider whether "the deference normally accorded to agency fact-finding may be reduced." Pet. at 13-14. Petitioners' argument fails to present a live controversy between the parties.

This Court has long held that a federal court may not "give opinions upon . . . abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895). *See also Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (stating rule); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (a federal court has neither the power to render advisory opinions nor "to decide questions that cannot affect the rights of litigants in the case before them." Its judgments must resolve "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of fact." *Id.* (citations and quotations omitted)); *Hayburn's Case*, 2 U.S. 409 (1792).

In this case, Petitioners merely posit hypothetical questions in their Petition, which fail to present a question to this Court in the context of a specific live grievance.

Petitioners' request for an advisory opinion is without merit.

CONCLUSION

For the reasons set forth above, there is no conflict among the circuits and the Petition raises no important unsettled questions of law warranting review by this Court. Petitioners' Petition should be denied.

Respectfully submitted,

STERLING E. RIVES
County Attorney
BARBARA M. ROSE
Deputy County Attorney
P.O. Box 470
Hanover, Virginia 23069
(804) 537-6035

WILLIAM G. BROADDUS
STEWART T. LEETH*
McGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, Virginia 23219
(804) 775-4719

* *Counsel of Record*

Counsel for Respondent
County of Hanover, Virginia